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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230.

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of Wabash Railway Company, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY, Respondents.

## BRIEF

**Of Central Hanover Bank & Trust Company, Trustee Under the First Mortgage of the Wabash Railroad Company, in Opposition to Petition for Writ of Certiorari.**

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### JURISDICTION OF THE COURT.

This Court unquestionably has the power to issue a writ of certiorari to review any decision of the Circuit Court of Appeals if it sees fit to do so. The real issue is whether petitioner has set forth any grounds which would warrant the issuance of a writ of certiorari by this Court in the exercise of its discretion. No one of the authorities cited

on page 14 of the petitioner's supporting brief has even a remote tendency to show that petitioner is entitled to the issuance of a writ of certiorari. On the contrary, there is no conflict shown between the decision of the court below and that of any other Circuit Court of Appeals; nor is the question raised by the petition one of general public interest or great importance. The writ should therefore be denied.

## STATEMENT OF THE CASE.

There are certain vital omissions from the petitioner's "Summary Statement of Matter Involved" which serve to give a misleading picture of the issue presented to the District Court and to the Circuit Court of Appeals on review. Petitioner correctly states (Petitioner's Statement, p. 5) that the petitioner's claim came on for hearing before the Special Master on August 26, 1935, and on January 6, 1936 (R. pp. 102 to 105). Petitioner neglects to state that at these hearings before the Special Master petitioner's claim, based upon his judgment for damages for personal injuries, was allowed as a general unsecured claim by consent of all parties, including petitioner, who was represented by counsel (R. pp. 102 to 105; further see Opinion of Circuit Court of Appeals p. 998; R. pp. 115, 116, 117).

It plainly appears that petitioner at the hearing before the Master offered no evidence other than a certified copy of the judgment and a bill for costs. It further appears that when (R. pp. 104, 105) the Special Master announced in the presence of counsel for the petitioner that the claim would be allowed as a general unsecured claim, no opposition to such a ruling was voiced by petitioner's counsel, despite the fact that counsel for petitioner was present at the time of the announcement. The record plainly shows that petitioner then asserted no more than

a general claim and by words and conduct consented to the report made by the Special Master.

The petitioner's statement calls attention to the fact that petitioner had received no notice of the filing of the Special Master's report, and further points out that at the time of the hearing the report had been neither approved nor affirmed (Petnr's Stafement p. 5). Petitioner fails to state, as the record shows, that no notice of the filing of the report was given to him, because the order of Court appointing the Special Master and authorizing him to hear claims (R. pp. 22-23) distinctly provided for notice by the Special Master only "before settling his report in any contested case."

## ARGUMENT.

In drafting his brief and setting forth the "Reasons Relied on for Allowance of the Writ" (Pet. p. 10) the petitioner has chosen to ignore the fundamental question decided by the Circuit Court of Appeals in its opinion below and to brief and argue instead a number of subsidiary propositions of law. Some of these propositions have some relevancy to the fundamental questions involved on the appeal, but none are decisive in the case.

Prior to ruling on the various issues of law discussed in the petition for certiorari it was necessary for the Circuit Court of Appeals first to determine whether the District Court's denial of appellant's application for leave to intervene was a reviewable order.

Under controlling decisions of this Court, such as **Credits Commutation Co. v. U. S.**, 177 U. S. 311, 44 L. Ed. 783, the question of the allowance of an intervention by the trial court was a matter addressed solely to the discretion of the trial court, and the trial court's exercise of discretion in denying leave to intervene was not subject to review on appeal unless the denial of intervention would be "a practical denial of certain relief to which the intervenor is fairly entitled and which he can only obtain by intervention."

The Circuit Court of Appeals enunciated the various principles of law, which the petitioner attacks, in the course of its examination of the proceedings below, with a view to determining whether or not the trial court's denial of intervention was an appealable order within the rule announced by this Court in the **Credits Commutation** case, supra. Having concluded (see opinion of Court of Appeals p. 1001; R. pp. 121 to 123) that the appellant's claim did not present a case "where a denial of the right to

intervention would be a practical denial of certain relief," the Court quite properly affirmed the trial court's decree.

The question of whether an absolute right of intervention existed or whether the District Court's order denying leave to intervene amounted to no more than an exercise of judicial discretion which is not subject to review on appeal, was, if determined adversely to the appellant's contentions, determinative of the cause, regardless of the nature of the questions of substantive law which appellant sought to raise by his appeal. The general rule precluding appellate review of orders denying leave to intervene and the limited scope of the exception thereto are concisely stated in **Credits Commutation Case**, supra, as follows:

> "Such an order (denying leave to intervene) not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court. * * * It is doubtless true that cases may arise where the denial of the right of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court to which a third party asserts some right which will be lost in the event he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief. The cases at bar, however, are not of that character."

It is plain from the record in this cause that petitioner had no absolute right to intervene for the very simple reason that whatever rights petitioner had could have

been adequately protected without the necessity of any formal intervention as a party to the cause.

The trial court's order appointing the Special Master (R. pp. 22, 23) authorized the Master to investigate, determine and report upon any and all claims against the receivership estate. No reason why petitioner could not have asserted any claim of preference to which he may have been entitled, by the filing of a claim before the Master, was suggested in the briefs below, nor is any shown in the petition for writ of certiorari.

The Circuit Court of Appeals concluded (and we believe correctly) that no right of preference existed, but assuming, for the sake of argument, that petitioner was entitled to a right of preference, an intervention as a party to the cause was wholly unnecessary in order to enable him to assert it.

No matter what view might be taken of petitioner's (claimant's) substantive rights as a judgment creditor of the Wabash Railway Company, those rights could have been sufficiently protected without encumbering the cause with an unnecessary intervention. It is a matter of common knowledge that claims for damages outstanding against a large railroad corporation are usually numerous. The Court's orders appointing the Special Master and authorizing him to hear claims were designed as a reasonable means for giving full relief to such creditors without hopelessly encumbering the proceedings by allowing a special intervention to each claimant. Since the Court had through this means afforded the petitioner a full, adequate and complete remedy for the assertion of his rights, intervention was neither necessary nor indispensable to the protection of any substantive right of the petitioner, and the trial court's action in denying leave to intervene amounted to no more than an exercise of judicial discretion, which is not subject to appellate review.

These issues, not discussed in the appellant's petition for certiorari, were determinative of the cause. We respectfully submit that the opinion of the Circuit Court of Appeals correctly follows the rules of law laid down by this Court in **Credits Commutation v. United States**, supra, and should not be disturbed by the issuance of a writ of certiorari.

## NO CONFLICT WITH A DECISION OF ANY OTHER CIRCUIT COURT OF APPEALS IS SHOWN BY PETITIONER.

The petitioner first asserts under point I that the decision of the Circuit Court of Appeals in this cause was in conflict with that of the Fourth Circuit in the case of **Bowen v. Hockley et al.**, 71 Fed. (2d) 781, l. c. 784, 786. In the first place the claim considered by the Court in **Bowen v. Hockley**, supra, was one based upon an award by a Workmen's Compensation Commission under a State Workmen's Compensation Act, whereas petitioner's claim was based upon a judgment rendered in a common-law action for damages for personal injuries. This difference is hardly eliminated by petitioner's grandiloquent assertion that the differences between such an award and a personal injury judgment are immaterial.

More fundamental even than this, however, was the fact (ignored in petitioner's argument) that the case of **Bowen v. Hockley**, supra, does not involve the question of the allowance of preference even to a Workmen's Compensation award over the lien of a prior recorded mortgage. Judge Parker's opinion carefully points out (l. c. 782) that the appointment of receivers was made in a suit brought "by a general creditor and stockholder." No reference to the existence of any outstanding bonds secured by the lien of a prior mortgage is made in any part of the opinion,

but, on the contrary, the opinion refers (l. c. 785) to the preservation of the business "for stockholders and creditors." There can hardly be any conflict between a ruling that a personal injury claim is not entitled to preference over the lien of a prior recorded mortgage of a railway company and a ruling that a Workmen's Compensation award is entitled to preference over the claims of stockholders and unsecured creditors in the receivership of an industrial corporation. The lack of similarity between the two situations is obvious.

Under point II of petitioner's "Reasons" (p. 10), he asserts that the ruling of the court below to the effect that petitioner was foreclosed from asserting any rights of preference by his consent to the allowance of his claim as a general unsecured claim, is in conflict with various decisions of other Circuit Courts of Appeal. We will discuss the opinions in the order in which they appear in petitioner's "Reasons."

The opinion of the court below is not in conflict with the decision in **Holman v. Cross**, 75 Fed. (2d) 909 (C. C. A. 6), because the petitioner (Carpenter) not only failed to except to the Master's report, but also consented to the allowance of his claim as a general claim at the hearing before the Special Master. This second factor, which was not present in the case of **Holman v. Cross**, supra, sufficiently distinguishes the two cases. The Circuit Court of Appeals' finding is based upon the additional fact that the claimant consented to the allowance of his claim as a general unsecured claim, as well as the fact that no exceptions were filed.

The decision of the Circuit Court of Appeals for the Fifth Circuit in **Lone Star Gas Company v. City of Fort Worth**, 93 Fed. (2d) 584, 585, involved the question of the weight to be given the conclusions of fact of a Special Master when the report is considered on review after ex

ceptions duly filed. The case contains no discussion of the effect of the allowance of a claim by consent, nor of the effect of a failure to except to a finding of a Special Master.

The opinion in **Childs v. County Trust Co. of New York,** 6 Fed. Supp. 821, affirmed 70 Fed. (2d) 1012, relates to the question of whether upon review, after exceptions duly filed, the findings of fact of the Special Master are conclusive, if supported by any substantial evidence. Their relevancy to the issue determined by the Circuit Court of Appeals is not apparent.

The decision of the Circuit Court of Appeals for the Second Circuit in **Employer's Life Assurance Assn. v. Astoria Mahogany Co.**, 6 Fed. (2d) 945, and **People etc. v. Hopkins et al.**, 18 Fed. (2d) 731, both involved the question of whether a claim is barred by a failure to file within the time fixed for filing claims in the absence of substantial resulting prejudice to the receivership estate. This question is obviously not the same as that involved in the case at bar.

Under point III petitioner cites two decisions of this Court with which the decision below is asserted to be in conflict. In the first of these, cited as "In re Metropolitan Railway Receivership, 208 U. S. 90-112," and styled "**In the Matter of Francis S. Reisenberg et al.,**" in 52 L. Ed. 403, the holding in the case is not even remotely in point. The petitioner in that case had filed an original application for leave to file a petition for a mandamus, directed to one of the Circuit Judges of the Second Circuit, commanding him to dismiss the receivership proceedings below and to vacate the injunction issued by the trial court. The actual holding of the Court was to the effect that the receivership appointment should be sustained and the petitions dismissed. The only portion of the opinion upon

which petitioner might place any reliance is some language in the concluding paragraph, which is as follows (l. c. 413 L. Ed., 112 U. S. Rep.):

> "The orders appointing the receivers and giving them instructions are most conservative and well calculated to bring about the earliest possible resumption of normal conditions when those who may be the owners of the property shall be in possession of and operate it. We have no doubt, if unnecessary delays shall take place, the court would listen to an application by any creditor, upon due notice to the receivers, for orders requiring the closing of the trust as soon as might be reasonably proper, or else vacating the orders appointing the receivers.
>
> "The rules are discharged and the petitions dismissed."

There is no conflict between this language and the holding of the Circuit Court of Appeals. The language above indicates merely that the trial court would in the first instance hear an application for intervention. The Circuit Court of Appeals in its opinion below did not in any way dispute this principle, but on the contrary held that where the trial court in the exercise of its discretion had determined that an intervention should not be allowed, its ruling was not subject to review on appeal. There is nothing in the language of this Court in the Reisenberg Case to the contrary.

The second authority relied upon is **Milwaukee & Minnesota R. R. Co. et al. v. Soutter**, 69 U. S. 510, 17 L. Ed. 900. This opinion is not in conflict with the holding of the Circuit Court of Appeals, but supports it. The Court states, l. c. 521 U. S. Rep., 904 L. Ed., that as a general rule "the appointment and discharge of a receiver are ordinarily matters of discretion in the Circuit Court with which this Court will not interfere." In the Soutter Case

the debtor corporation filed a petition in which it offered to pay all the money due on the mortgage under which foreclosure proceedings had been instituted, and requested that upon such payment an order be made discharging the receiver and returning the road to the possession of its owners. This Court held that the facts stated amounted to an exception to the general rule, and that a refusal to grant the order upon payment of the balance due was reversible error. There being no facts in this case at all similar to the peculiar facts involved in the Soutter Case, the Circuit Court of Appeals properly followed the general rule recognized in the Soutter Case, and refused to review the District Court's exercise of discretion.

## THE ISSUES PRESENTED BY THE PETITION FOR CERTIORARI ARE OF NO GENERAL IMPORTANCE.

Under point IV petitioner alleges two grounds which are apparently considered to be a basis for the allowance of a writ of certiorari, because of the importance of the questions which the petitioner believes to be involved. Under point (a) petitioner asserts that the "curbing of friendly relationship abuses will be greatly impaired if 'any creditor, irrespective of rank, may be denied the right to remove or discharge receivers who are unfit, unqualified and not disinterested.'" Petitioner asserts that this presents an issue which has never been settled by this Court. The trial court which appointed the receivers and was familiar with the proceedings, in the exercise of its judicial discretion concluded that the allowance of an intervention by the petitioner would merely serve to delay the orderly processes of reorganization in the cause.

The Circuit Court of Appeals (see Opinion R. pp. 122, 123) agreed with this conclusion.

The primary question raised was whether the District Court's denial of the intervention was an appealable order, and this Court's opinion in the **Credits Commutation Case**, supra, was a definite ruling upon that question.

Finally, under point IV (d) petitioner argues that this Court should determine whether a "due observance of the spirit and purpose" of Section 77 of the Bankruptcy Act, as amended, would require that the same limitations on eligibility prescribed in section 77 for trustees to be appointed in a reorganization proceeding, should also apply to an appointment of receivers in an equity receivership. The purported question thus stated has so little substance that it hardly merits consideration.

Section 77 (c) (1) of the Railroad Reorganization Act refers exclusively to the appointment of trustees in proceedings under Section 77 of the Bankruptcy Act. Throughout the Railroad Reorganization Act, wherever any of its provisions are intended to have any application to receivership proceedings, as well as to bankruptcy proceedings, the intention is expressed specifically. For example, Section 77 (p) of the Railroad Reorganization Act, which places certain limitations upon the solicitation of proxies, is expressly made applicable "during the pendency of proceedings under this section or of receivership proceedings against a railroad corporation in any state or federal court." Subsection (n) of the Railroad Reorganization Act as originally enacted provided for a right of preference only in favor of injured employees "in proceedings under this section." Recognizing that the act was inapplicable to equity receiverships except when it was made applicable by specific reference thereto, Congress, on August 11, 1939, amended subsection (n) so as to provide for the preference of such claims both "in proceedings under this section" and "in equity receiverships of railroad cor-

porations now or hereafter pending in any court of the United States."

The incongruity of haphazardly applying provisions of the Railroad Reorganization Act, which was enacted by Congress in the exercise of its bankruptcy powers, to equity receiverships, is obvious. We are unable to understand how anyone could conclude that procedural provisions of the Railroad Reorganization Act have any application to an equity receivership. The text of the act itself lends no support to the idea. We see no reason why this Court should grant a writ of certiorari in order to decide a question which is reasonably obvious on the face of the Railroad Reorganization Act.

The petitioner's fundamental contention in its original petition is that the provisions of Subsection (n) of Section 77 of the Bankruptcy Act, as amended on August 27, 1935, should be applicable to a judgment in an equity receivership even though the section itself is by its terms expressly made applicable only to proceedings "under this section" (Section 77 of the Bankruptcy Act). We have previously pointed out that whenever Congress intended for any portion of the Railroad Reorganization Act to be applicable to equity receiverships, the intention was expressed in clear language. A comparison of subsection (n) of section 77, as amended August 27, 1935, with subsection (p) of the same section of the act, plainly indicates that subsection (n) was made applicable only to bankruptcy proceedings under section 77 in contrast to equity receiverships.

Subsection (n) was amended by Congress on August 11, 1939, to provide as follows:

> "In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corpo-

> ration, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds executed by sureties without security, for and in any action brought against such railroad corporation or trustee appointed pursuant to this section, shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad * * *."

The amendment was made by Congress after the Circuit Court of Appeals rendered its decision and, of course, was not considered by the Court. When and if the question of the applicability of subsection (n), as amended August 11, 1939, is raised in a proper proceeding, the applicability of the section to prior equity receiverships in which the status of claims for personal injuries has already been determined long prior to the enactment of the amendment can be decided. The Court can also decide whether the amended section if applicable would operate to deprive the holders of bonds secured by the lien of a mortgage recorded prior to the act of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

These, however, are not the issues which appellant seeks to raise in his original petition for writ of certiorari. His petition, rather, seeks to raise the question of the applicability of the old subsection (n) to equity receivership proceedings in contravention to the express terms of the section. The enactment of a new amended section automatically eliminates the possibility of such a question arising in the future in other receiverships, because as to such subsequent receiverships the question involved will be the applicability and constitutionality of the new section rather than the petitioner's purported construction of the

old, superseded section. It is obvious, therefore, that the question which petitioner seeks to raise by his original petition is one which in the nature of things is peculiar to this particular case, and is not and cannot be of any public interest or any great importance as a matter of general law in the interpretation of the Bankruptcy Act.

By amended and supplemental brief petitioner calls attention to the enactment of the amendment of subsection (n). Assuming, without citation of authorities or argument, that the amendment creates a preference in favor of petitioner's claim, he urges this as an additional ground for the issuance of a writ of certiorari. When the case was tried and decided below there was no way of anticipating the enactment of the amended section. The record below was made up with a view to establishing the facts necessary for a determination of the issues raised by the petitioner's application for leave to intervene under the law as it then stood. Additional facts with reference to the situation existing in the receivership, and with reference to the existence and prior recording of the various mortgages on the line of the railway company, as well as other matters, should be established and shown by the record before any court will be in a position to determine whether the amended section is applicable to these receivership proceedings and to the claim of the petitioner, Carpenter, and whether, if applicable, the amendment is valid. To proceed to give effect to what petitioner claims to be the proper construction of the amended subsection without first having these matters before the Court for consideration, would be obviously unfair to the rights of these respondents, and to other creditors whose liens are secured by prior recorded mortgages.

Respondents, therefore, submit that the applicability and constitutional validity of the amended subsection (n)

should not be decided in this proceeding in the present state of the record, and that a writ of certiorari should not be granted for that purpose.

Respectfully submitted,

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